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In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., APPELLANTS

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE APPELLANTS

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REPLY BRIEF FOR THE APPELLANTS

As we argue in our opening brief, the "transmission" (47 U.S.C. 223(a)(1)(B)), "specific child" (47 U.S.C. 223(d)(1)(A)), and "display" (47 U.S.C. 223(d)(1)(B)) provisions of the Communications Decency Act of 1996 (CDA) (Pub. L. No. 104-104, 110 Stat. 133) are facially constitutional. All three provisions constitutionally advance two overriding government interests: protecting children from the harmful effects of sexually explicit patently offensive communications, and facilitating the First Amendment interest of parents and children in using the Internet and other interactive computer services.

1. a. Appellees devote very little effort to defending the district court's invalidation of the transmission and specific child provisions. Instead, appellees argue (ALA Br. 46; ACLU Br. 46) that the Court should not consider the government's arguments on those provisions because the government did not argue below that they have a narrower scope than the display provision. In fact, however, the government made the same argument in the district court that it is making now, except in abbreviated form. U.S. Opp. to Mot. to Aff. 3.

In any event, in framing the questions presented for review by this Court, the government was not required to limit itself to the precise arguments made below. *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). In our jurisdictional statement, we presented a separate question concerning the validity of each provision, and we argued that the transmission and specific child provisions are narrower than the display provision and easily survive constitutional analysis. J.S. I, 20-21. We reiterated that argument in our opposition to the motion to affirm (at 2-4). That argument is therefore properly before the Court.

b. Appellees contend (ALA Br. 44; ACLU Br. 47) that we have not made clear whether the transmission and specific child provisions are limited to situations in which

the sender knows that the *only* persons receiving the communication are under 18, or whether those provisions also apply when the sender knows that at least one of the recipients is under 18. In our opposition to the motion to affirm (at 4 n.1), however, we explained that the provisions apply to both situations. We have never suggested otherwise.

c. ACLU contends (Br. 47) that Congress could not have intended to limit the transmission and specific child provisions to situations in which the sender knows that a particular recipient is a minor, because the statutory defenses apply to those provisions, and it would be "nonsensical" to permit someone who committed such a knowing violation to assert a "good faith" or "verified credit card" defense. Section 223(e)(5), however, establishes a "defense to prosecution," and Congress reasonably could have decided to add an additional layer of protection in order to relieve persons without the relevant knowledge from having to litigate that issue. Thus, if a speaker sends an indecent message to a minor, and the speaker can show that the minor used a verified credit card, the speaker will not be required to litigate the question of whether he knew that the recipient was a minor. There is nothing "nonsensical" about that approach. In any event, ACLU's concerns do not provide any basis for ignoring the text of the transmission and specific child provisions, both of which clearly impose a knowledge requirement.

d. Appellees contend (ALA Br. 44-45; ACLU Br. 47-48) that, even when the transmission and specific child provisions are construed in the manner we have suggested, they are facially unconstitutional. That contention is without merit.

As we explain in our opening brief (at 19-20), *Ginsberg* v. *New York*, 390 U.S. 629 (1968), and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), establish that there is no First Amendment right to disseminate indecent material

to children. As applied to situations in which the sender knows that the only recipients are children, the transmission and specific child provisions are indistinguishable from the prohibition on the sale of indecent material to children upheld in *Ginsberg* and are therefore clearly constitutional.

The transmission and specific child provisions are also constitutional as applied to situations in which a person disseminates information to a group, knowing that at least one of the members of the group is a minor. Requiring someone to refrain from disseminating an indecent communication to such a mixed group does not significantly burden adult-to-adult communications. For example, if a person who wants to transmit an indecent communication learns that one of the persons in a chat group is under 18, he can simply tell the child to leave the chat room and wait for the child to sign off, or he can invite the adults to another chat room.

In daily life, adults having a sexually explicit conversation ordinarily would not think of continuing the conversation when a child walked into the room and could overhear what was being said. Instead, the child would be told to leave the room, or the adults would arrange to have the conversation at a different place or a different time. The transmission and specific child provisions do nothing more than require adults to exercise that same degree of responsibility when they use the Internet.

2. As we argue in our opening brief (at 28-33), the display provision is constitutional under the principles established in *Pacifica* and *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Those cases hold that, in limited circumstances, government may adopt reasonable time, place, or manner restrictions that apply exclusively to indecent content. *Pacifica* holds that such restrictions are permissible when indecent communications pervasively invade the home; *Renton* holds that such restric-

tions are permissible when they are aimed at the secondary effects of indecent communications. Both justifications are present here.[1]

a. Appellees contend (ALA Br. 26-27; ACLU Br. 24) that *Pacifica* is distinguishable because its approval of the FCC's approach depended on the likelihood that persons would chance upon indecent broadcasts inadvertently. There is a significant danger of inadvertent exposure to indecent material on the Internet as well.[2] More significant, however, the danger of inadvertent exposure was not a necessary element of the decision in *Pacifica*. The FCC relied on that factor only because one reason for its restriction was the protection of unconsenting *adults*. 438 U.S. at 731 n.2. The principal reason for the restriction in *Pacifica* was the FCC's "special concern" that "children have access to radios and in many cases are unsupervised by parents." *Ibid.* That concern for unsupervised access exists regardless of whether children inadvertently stumble upon indecent material or deliberately search for it. The lesson of *Pacifica* is that when the danger that

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[1] In general, time, place, or manner restrictions that address speech on the basis of content are subject to strict scrutiny. *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 536 (1980). *Pacifica* and *Renton* create narrow exceptions to that general principle. Because the display provision is constitutional under *Pacifica* and *Renton*, it need not be subjected to strict scrutiny. In any event, for the reasons set forth here and in our opening brief, the display provision is narrowly tailored to further two compelling interests. Thus, even if strict scrutiny were applicable, the display provision would be facially constitutional.

[2] See Linton Weeks, *A Safety Net For Children*, Wash. Post, Feb. 27, 1997, at B1 (noting that while the search term "eruption" recovered sites containing valuable information on the earth's crust, its first retrievable site was titled "Eruption" and promised "all nude" sex, "[a]ll presented in a manner designed to ensure your eruption"); see also Gov't Br. 29 ("Jasmine," "Sleeping Beauty," and "Little Women" retrieved long lists of sexually explicit sites).

children will obtain access to indecent material becomes sufficiently serious, government may channel the indecent communications so as to minimize the risk that children will be exposed.

The danger that unsupervised children will obtain access to indecent material is especially acute on the Internet. As we explain in our opening brief (at 28-29), the amount of indecent material on the Internet is staggering, and many children have a strong proclivity to seek it out. Moreover, it may even be more difficult to supervise a child's Internet use than his television use. Because of its educational importance, many parents may want their children to use the Internet for significant periods of time, including when the parents are away; a computer may often be located in a child's bedroom, making effective monitoring more difficult; and even parents who check which television shows their children are watching may simply not have the time or patience to watch their children conduct extended Internet searches. Thus, in many ways, there is even a stronger justification for the display provision than for the restriction upheld in *Pacifica*.

b. Appellees' attempt to distinguish *Renton* is also unsuccessful. Appellees contend (ALA Br. 28; ACLU Br. 25-26) that the effect of patently offensive communications on children is a primary rather than a secondary effect. The primary effect of constitutionally protected adult-to-adult communication, however, is on adults. The harm to children is a secondary, spillover effect of that constitutionally protected adult-to-adult expression. See *American Booksellers* v. *Webb*, 919 F.2d 1493, 1502 n.16 (11th Cir. 1990) (identifying harm to children from display of sexually explicit magazines in retail stores as secondary effect that justified requirement that stores put magazines in opaque wrappers), cert. denied, 500 U.S. 942 (1991); see also *Upper Midwest Booksellers Ass'n.* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1986) (upholding wrapper

law as reasonable time, place, and manner restriction); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983) (same).

Appellees' reliance (ALA Br. 28) on *Boos* v. *Barry*, 485 U.S. 312 (1988), is misplaced. There, the Court stated that "[r]egulations that focus on the direct impact of speech on its audience" cannot be justified under *Renton*. *Id.* at 321. Because there is no constitutionally protected right to disseminate indecent material to children, the relevant "audience" here consists entirely of adults. Thus, while a law premised on the view that indecent material causes psychological damage to adults could not be justified under *Renton*, a law premised on the view that such material harms children can be.

As we explain in our opening brief (at 30-31), the display provision is also addressed to the danger that parents will be deterred from bringing the Internet into their homes because of concern for their children. That danger is one step further removed from the impact of the communications on adults and is even more clearly a secondary effect.

3. Appellees contend (ALA Br. 14-25; ACLU Br. 21-22) that the display provision is not a time, place, or manner restriction, but is instead an absolute ban on constitutionally protected adult-to-adult communication. The display provision, however, does not legally prohibit the dissemination of indecent communications to adults. It prohibits only those communications that are displayed "in a manner available to a person under 18 years of age," 47 U.S.C. 223(d)(1)(B), and it establishes a defense to prosecution for persons who restrict minors' access to their indecent postings through a credit card, adult identification number, or any other effective means, 47 U.S.C. 223(e)(5). The display provision therefore expressly *permits* adults to disseminate indecent material to other adults. It limits only the place and manner in which indecent material may be communicated.

a. Appellees nonetheless contend (ALA Br. 16-21) that the display provision should be regarded as an absolute ban because of the technical difficulties of screening children from certain areas of the Internet and because of the costs and burdens associated with screening children from others. This Court has never treated a regulation that legally permits adult-to-adult indecent communication as a ban. All three cases relied upon by appellees involved legal prohibitions against the dissemination of information to adults. *Sable Communications* v. *FCC*, 492 U.S. 115 (1989); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler* v. *Michigan*, 352 U.S. 380 (1957). To accept appellees' contention that the display provision constitutes a ban on protected speech would require a dramatic extension of those cases.[3]

It may be reasonable to equate technological impossibility with a ban. But appellees' contention that the costs and burdens of utilizing means that are technically feasible transform a time, place, or manner restriction into a ban eliminates any distinction between flat ban and other restrictions on constitutionally protected speech: The costs and burdens of complying with a time, place, or

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[3] Appellees also contend (ACLU Br. 21-22) that a ban on indecent speech is per se unconstitutional. The three cases relied upon by appellees do not support that contention. In each of those cases, there was an alternative to a ban that would have effectively served the government's interest. *Sable*, 492 U.S. at 128-130 (ban on dissemination of indecent messages held unconstitutional when credit card, access code, and scrambling rules would be effective in protecting children); *Bolger*, 463 U.S. at 73 (ban on use of mail to send unsolicited advertisements for contraceptive products held unconstitutional when parents could either prevent such information from reaching their mailboxes or could exert sufficient control of what entered their mail boxes to prevent unwanted mailings from reaching children); *Butler*, 352 U.S. at 383 (ban on sale to adults of books deemed harmful to children held unconstitutional when prohibition on sale of such books to children would satisfy State's interest).

manner restriction will almost always cause some persons to refrain from speaking. What distinguishes a ban from other speech-related regulations is the certainty and universality of its effect. See *Denver Area Educ. Telecommunications Consortium* v. *FCC*, 116 S. Ct. 2374, 2387 (1996) (noting that a distinguishing feature of a governmental ban is its "certainty"). In assessing whether the display provision is the equivalent of a ban, the relevant inquiry should therefore be whether there are technically feasible means for adult-to-adult communication, not whether the use of available technology to screen children entails burdens and costs that deter some or even many from speaking.

That distinction is supported by *Renton*. There, the Court upheld a zoning scheme that restricted the places in which adult theaters could locate. While more than 5% of the land in the city was technically available for the opening of adult theaters, the theater operators asserted that none of the existing sites were "commercially viable." 475 U.S. at 52. The Court rejected the operators' contention that the zoning scheme therefore effectively operated as a ban on speech, relying in part on Justice Powell's observation in *Young* v. *American Mini Theatres*, 427 U.S. 50, 78 (1976) (concurring opinion), that "[t]he inquiry for First Amendment purposes is not concerned with economic impact." *Renton*, 475 U.S. at 54.

Appellees argue (ALA Br. 23) that a restriction should be viewed as a ban unless, as a practical matter, speakers can reach the audience they want to reach at the time they want to reach it. That view cannot be squared with *Pacifica* or *Renton*. As a practical matter, programmers who are limited to late-night hours are unlikely to obtain the same audience they could obtain during prime time, and adult theaters that locate miles away from residential areas may not attract the same audience they would if they were closer. That kind of practical consequence does

not transform a time, place, or manner restriction into a ban. In general, speakers are entitled to no more than a reasonable opportunity to reach their intended audience.

b. Appellees concede (ALA Br. 18) that it is technologically possible for speakers to screen for age on the World Wide Web. Under the correct legal standard, that concession is sufficient to dispose of appellees' contention that the display provision is the equivalent of a ban on adult-to-adult communication of indecency. The Web affords almost unlimited opportunities for those who are so inclined to disseminate and receive patently offensive communications. And with the use of available screening technologies, all but the most determined children can be prevented from obtaining access to that material.[4]

ALA contends (Br. 23) that chat rooms, newsgroups, and mail exploders (none of which had been developed on the Web at the time of the preliminary injunction (PI) hearing) involve distinctive forms of communication. But ALA does not identify what makes those forms of communication so distinctive that communication through the Web (as it existed at the time of the PI hearing) would not largely serve the same purpose. ACLU asserts (Br. 33) that telling someone who is in a chat room that she must switch to the Web before disseminating patently offensive

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[4] ALA's assertion (Br. 18) that AOL subscribers cannot screen for age on the Web sites made available to them is somewhat misleading. While AOL subscribers would have to establish a site through a different server in order to screen for age, AOL subscribers can obtain *access* to *all* Web sites through AOL (including those that screen for age). ACLU's contention (Br. 28) that the display provision operates as a ban on persons who want to put content on AOL sites reflects a misuse of the term "ban." Such persons can simply establish a Web site through a different service provider—or AOL itself could conform its Web-posting software to that used by many others. By ACLU's logic, the FCC policy in *Pacifica* was a "ban" on broadcasting indecent material and the ordinance in *Renton* was a "ban" on adult theaters.

material "is analogous to requiring a speaker chatting on a street corner, before [communicating indecency], to stop mid-sentence, leave the corner, write down her thoughts, and have them published and sold at a bookstore that screens out minors." Once a person has established a Web site that screens for age, however, our proposed "chat room to Web site switch" is much more analogous to an adult talking to members of the public on a street corner, starting to discuss the latest X-rated movie in graphic terms, noticing that children may overhear the conversation, and then asking the group to accompany her across the street so that she can complete her thoughts outside the presence of children.

Moreover, appellees' concerns about the inability to engage in "distinctive" forms of communication have largely become moot since the time of the PI hearing. As we explain in our opening brief (at 37-38 & n.10), since the time of that hearing, chat rooms and newsgroups have begun to proliferate *on the Web*. A recent Newsweek article documents that trend. Katie Hafner, *Look Who's Talking*, Newsweek, Feb. 17, 1997, at 70-72.[5] While appel-

[5] Among others, Newsweek lists the following chat rooms and discussion groups:

(1) www.chat.yahoo.com: "Its approach is to center chat on the categories in the directory."

(2) www.talk.com: "Created by [appellee] HotWired[] the uncensored chat here is in keeping with Wired's cyber-libertarian philosophy."

(3) www.wbs.net: "Chatters on this popular system can put a picture of themselves next to their typed text."

(4) www.talkcity.com: "300-plus chat rooms. It also provides a calendar with dates and times when special-interest chats are taking place."

(5) www.minds.com: "[E]mphasiz[es] conferenc[es]" in which "conversations take place as a series of postings organized into different topics. * * * Postings * * * stay up on the system for months at a time."

lees correctly note (ACLU Br. 32-33) that no evidence was presented to that effect at the PI hearing, it is telling that they do not dispute our assertion concerning the status of the Web today.[6] Having enacted the display provision at a time when the Web already provided wide-ranging opportunity to communicate indecent material to adults, Congress could reasonably rely on such market developments to afford even greater opportunity for such communication.

4. As we acknowledge in our opening brief (at 39), the cost of complying with the display provision is relevant to the constitutional inquiry. When a limitation on speech imposes significant costs, and a much less costly alternative would serve the government's interest equally well, government must choose the less burdensome alternative. But the costs of complying with the display provision are reasonable, and there is no alternative that would vindicate the government's interest equally well.

a. Appellees rely (ALA Br. 18) on a district court finding (J.S. App. 74a) that it would be "prohibitively expensive" for many speakers to operate adult verification systems. But as appellees acknowledge (ALA Br. 21), many commercial providers already require credit cards for the purchase of their material. The district court did not suggest that compliance with the display provision would be prohibitively expensive for them. Even as to noncommercial providers, the district court's finding addresses only the cost of creating and operating an adult verification system by oneself. That is not the only option. Appellees may pool their resources and create and main-

[6] The district court anticipated this development. See J.S. App. 32a ("Because of the rapidity of developments in this field, some of the technological facts we have found may become partially obsolete by the time of publication of these findings.").

tain a common adult verification system. Alternatively, appellees may hire another entity to provide such a service for them. The district court did not find that either one of those alternatives would be prohibitively expensive.[7]

In assessing the reasonableness of the costs of compliance, it is also significant that they do not come in the form of an undifferentiated tax. All the display provision requires is that speakers bear whatever costs are necessary to prevent their communications from harming children. Equally important, Congress expressly provided a forward-looking, open-ended defense that allows a person to use any method for screening that is effective. 47 U.S.C. 223(e)(5)(A). As the private market and technology evolve, the costs associated with protecting children are likely to become trivial.

b. Appellees contend (ALA Br. 34-37; ACLU Br. 36-37) that parental control software provides a more effective and less restrictive means of protecting children from Internet indecency. But as we explain in our opening brief (at 40-41), parental control software programs that attempt to screen out indecent sites are not effective because they can neither find all existing indecent sites nor keep pace with the explosion of new ones. At the same

[7] As we explain in our opening brief (at 36), third-party verification systems already exist that do not charge content providers for their services. While appellees do not wish to be associated with services that cater to pornographic sites, nothing would prevent appellees from using their market power to secure the services of an entity that would serve non-pornographic sites. Appellees' concern (ALA Br. 19) that persons will not purchase adult IDs in order to visit a single site is misguided. An adult ID, which can be purchased for a small fee, would entitle a person to visit multiple sites over an extended period. Appellees' desire to distribute their material cost-free (*ibid.*) and to remain completely anonymous (ACLU Br. 32) cannot take precedence over the interests in protecting children from the harmful effects of patently offensive communications and in ensuring that everyone enjoys the educational benefits of the Internet.

time, parental control software programs that screen out all sites except those that have been rated decent are effective in screening out indecent sites, but provide access to only a minuscule portion of the Internet. Reliance on such software would therefore defeat the government's ability to further the interests of parents and children in obtaining the educational benefits of the Internet. All existing software, including that provided by the major on-line services, suffers from one of those two deficiencies. Congress therefore reasonably concluded that, while parental control software could provide part of the answer to the problem of indecency on the Internet, it could not provide the full answer. Gov't Br. 40.

The district court did not conclude otherwise. Judges Sloviter and Buckwalter pointedly refrained from concluding that parental control software was a less restrictive alternative that would effectively vindicate the government's interests. See J.S. App. 77a-81a (Sloviter, J.); *id.* at 86a-87a (Buckwalter, J.).[8]

5. a. Appellees contend (ALA Br. 30-31) that Congress did not have evidence that patently offensive communications on the Internet pose a serious problem. But proponents and opponents of the CDA agreed that the problem was a serious one,[9] and the evidence introduced at trial confirms the pervasive nature of the problem. The

[8] Although Judge Dalzell identified blocking software as an option available to parents, he did not rely on such software to conclude that the statute was constitutionally infirm. J.S. App. 146a. Contrary to ACLU's assertion (Br. 36), Judge Dalzell's statement is not a "finding" of the district court.

[9] *E.g.*, 141 Cong. Rec. S8092 (daily ed. June 9, 1995) (remarks of Sen. Kerrey) ("I am prepared to acknowledge, and I think we should all acknowledge, there is a serious problem here."); *id.* at S8473 (daily ed. June 15, 1995) (remarks of Sen. Robb) (noting "the widespread availability of materials on the Internet that are entirely inappropriate for children"); Gov't Br. 6-7.

government's expert conducted a search of the Internet for pornography using the most obvious search terms and retrieved long lists of sites containing sexually explicit pictures. See generally J.A. 1-42 (declaration of Howard A. Schmidt). A notebook accompanying the expert's declaration contains the results of his search and leaves no doubt that Congress was addressing an extremely serious problem.

b. Appellees argue (ALA Br. 31-32; ACLU Br. 26) that Congress did not assert an interest in ensuring that parents would not be deterred from using the Internet when it enacted the CDA and that the government therefore may not assert such an interest now. The leading supporters of the CDA, however, clearly voiced that interest.[10] Appellees also assert (ALA Br. 31-32; ACLU Br. 30) that Congress did not have sufficient evidence to support its conclusion about the effect of indecency on Internet use. But Congress did not need to compile an evidentiary record to know that, if pornography remained freely

[10] *Cyberporn and Children: The Scope of the Problem, the State of the Technology, and the Need for Congressional Action: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong., 1st. Sess. 7 (1995) (opening statement of Sen. Grassley) ("Congress must give America's parents a new comfort level in public and commercial networks if these are to be transformed from the private preserve of a special class of computer hackers into a widely used communications medium. This necessary transformation will never happen if parents abandon the Internet and computer communications technology remains threatening."); 141 Cong. Rec. S8339 (daily ed. June 14, 1995); *id.* at S8339-S8340 (remarks of Sen. Exon) (expressing the desire to make the Internet "even bigger" and "even better, but not for raunchy pornography that would turn most people off"); *id.* at S8339 (remarks of Sen. Exon) ("it has been estimated that up to 75 percent * * * of present computer owners have refused to join the Internet system with their home computer, precisely because they know and they fear—and evidently they have seen or been advised as to [the prevalence of pornography on the Internet]").

available on the Internet, many parents would be "scared to death" about "its effect on their children," or that school principals who had encouraged parents to link their home computers to the Internet would reconsider their advice after learning more about "the seamy underbelly of the Internet." Wash. Post, note 2, *supra*, at B5. Congress could rely on its common sense and its understanding of the American people to reach those conclusions.

6. Appellees contend (ALA Br. 32-34) that the CDA will not be effective in accomplishing its goal because it will not deter persons outside the country from posting indecent communications. In issuing its preliminary injunction, however, the district court did not address that contention. It therefore did not address the extent to which the CDA applies to the foreign display of indecency on the Internet; it made no finding concerning what percentage of indecent speech originates outside the United States; it made no finding concerning the extent to which the CDA would deter the posting of indecent information outside the United States; and it reached no conclusion concerning the legal significance of any possible diminution of the CDA's effectiveness caused by indecency that originates from outside this country. This Court should not attempt to resolve questions like those in the first instance.[11]

In any event, appellees err in contending that the CDA will not serve the government's interests "in a direct and material way." *Turner Broadcasting Sys., Inc.* v. *FCC*, 512 U.S. 622, 664 (1994). The CDA will be fully effective in eliminating domestic displays of indecent material to children, which could eliminate as much as 70% of all such

[11] ACLU relies on a statement by Judge Dalzell that the CDA "will almost certainly fail to accomplish the Government's interest." ACLU Br. 34 (quoting J.S. App. 145a). But that statement was not joined by either of the other judges.

displays. See ALA Br. 32 n.42. That still leaves a significant problem. But other avenues, such as actions by foreign governments and parental control software, can work together with the CDA to control the foreign component of the problem. The existence of a law that is fully effective in this country assists each of those efforts. Such a law sets an example for other countries and puts the United States in a position to urge them to establish effective controls. At the same time, the effective screening of 70% of all patently offensive sites makes it easier for parental control software to keep pace with the sites that remain. Beyond that, the CDA sends an unambiguous message that minors' access to patently offensive material is not condoned in this country. Because the harm to children from viewing patently offensive material is exacerbated when there is an implicit societal approval of that activity, *Ginsberg*, 390 U.S. at 642 n.10, the sending of a clear message of disapproval is itself significant.

The extent to which our laws are applied to persons in other countries raises distinct policy concerns and practical enforcement difficulties. *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 794-799 (1993). This Court has never suggested that such considerations could affect the constitutionality of a law that is fully effective domestically.[12]

7. a. Appellees contend (ALA Br. 37-43; ACLU Br. 42-46) that all three provisions of the CDA are unconstitutionally vague. But the statutory text, when read in

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[12] The cases relied upon by appellees (ALA Br. 34) all involved laws that regulated certain domestic activities and exempted others that caused the same problem without any logical basis for treating the regulated and exempted activities differently. Such half-hearted efforts impeach the genuineness of the government's claim that it is advancing an interest of the highest order. *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546-547 (1993). For the reasons set forth above, those cases are inapposite here.

light of its origins and legislative history, provides sufficient guidance concerning what should and should not be screened from children to avoid vagueness concerns.

First, the CDA applies only to communications about "sexual or excretory activities or organs." 47 U.S.C. 223(d)(1). No matter how shocking they may be, depictions that are not sexual or excretory in nature fall outside the scope of the CDA. Second, the CDA encompasses only those communications about sexual or excretory matters that are "patently offensive." *Ibid.* The communication therefore must be offensive in a way that is obvious or immediately apparent. *American Heritage Dictionary* 1326 (3d ed. 1992). Third, a communication is indecent only when it is patently offensive "in context." 47 U.S.C. 223(d)(1). For example, whereas an entire novel, taken as a whole, might not be "patently offensive," display of certain excerpts out of context might well be. Similarly, an "occasional expletive" will not render a communication indecent. *Denver Area*, 116 S. Ct. at 2390. Fourth, material with serious scientific, educational, news, or artistic value cannot be found to be "patently offensive," except in the most extreme circumstances, such as when such material is displayed "with a highly unusual lack of concern for viewer reaction." *Denver Area*, 116 S. Ct. at 2390. H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 189 (1996) ("[m]aterial with serious redeeming value" that "is quite obviously intended to edify and educate, not to offend" is not patently offensive). Thus, while a few of the examples discussed by appellees and their amici could be found to be patently offensive (*e.g.*, Appendix of Exhibits to Brief of Amici Curiae American Association of University Professors, et al., Exh. 3, Item 4; *id.* Exh. 10), the vast majority could not be. Finally, while nudity alone is not enough to make material patently offensive, centerfolds and similar materials that pander to prurient interest are covered by the CDA (Gov't Br. 6-7).

b. Apparently conceding that the formulation Congress chose would survive a vagueness challenge in other contexts, appellees contend that several factors render that formulation unconstitutionally vague here. ALA contends (Br. 38), for example, that the criminal nature of the offense is significant. But this Court has already approved analogous formulations in criminal statutes. See *Miller* v. *California*, 413 U.S. 15, 25 (1973); *Ginsberg*, 390 U.S. at 632-633.[13] ALA points out (Br. 40-41) that patent offensiveness was only one of the three elements in the statutes upheld in those cases. Each of those elements, however, was independent. Appellees cite no authority for their view that an independent element of an offense may be vague as long as other independent elements of the offense are not. Moreover, although lack of serious value is not an element of a CDA offense, the presence of serious value would almost always negate a finding of patent offensiveness. In actual operation, then, there will only be minor differences between the CDA's provisions and the statute approved in *Ginsberg*.

Appellees also find it significant that the CDA applies to millions of ordinary citizens. ALA Br. 38; ACLU Br. 42. Ordinary citizens, however, should have no difficulty figuring out that the pornographic pictures in the Schmidt notebook should be screened for age. More generally, there is "no basis for concluding that Internet content providers are any less capable than those subject to obscenity laws or other indecency restrictions to acquire a general familiarity with the relevant standards." *Shea*

[13] Because the CDA is designed to protect children, the meaning of patently offensive is that set forth in *Ginsberg*—"patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors." 390 U.S. at 633. It is not limited to the kind of "hard core" pornography that would be patently offensive for adults. *Jenkins* v. *Georgia*, 418 U.S. 153, 160 (1974).

v. *Reno*, 930 F. Supp. 916, 937 (S.D.N.Y. 1996), appeal pending, No. 96-595 (jurisdictional statement filed Oct. 15, 1996).

ACLU contends (Br. 45-46) that the CDA does not make clear whether patent offensiveness should be judged by a national or local standard. Even if a local standard was intended, ACLU contends, the CDA does not make clear which local standard applies. Because a jury (rather than a federal agency) must decide the question of patent offensiveness, however, the relevant standard is necessarily local: to require a local jury to apply a national standard "would be an exercise in futility." *Miller*, 413 U.S. at 30. The relevant community standard is the standard of the community in which the jury is empaneled.[14]

ALA contends (Br. 39) that, because the Internet is a global medium, Internet content providers must tailor their speech to fit the community standards of the least tolerant community in the nation. There is nothing constitutionally problematic, however, about requiring a nationwide provider of information to take account of the sensibilities of each of the communities in which it makes its information available. *Sable*, 492 U.S. at 125-126 ("If [the provider's] audience is comprised of different communities with different local standards, [the provider] ultimately bears the burden of complying with the prohibition on obscene messages."). In most cases, what is patently offensive in one community will be patently offensive in most. In borderline cases, where different communities

[14] The reference in the Conference Report to a "uniform national standard of content regulation" (H.R. Conf. Rep. No. 458, *supra*, at 191) does not suggest that local juries should attempt to divine a national standard of what is patently offensive. Instead, it means that juries throughout the country will all decide the same question—whether the material in question is patently offensive in light of local community standards.

may react in different ways, a person need only screen for age in order to avoid the possibility of criminal sanctions.[15]

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For the foregoing reasons, as well as those stated in our opening brief, the district court's order granting a preliminary injunction should be reversed.

Respectfully submitted.

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Acting Solicitor General

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[15] Appellees provide no answer to our argument (Br. 45-48) that preliminary injunctive relief must be limited to applications of the display provision that are determined to be unconstitutional and that all other applications must be left intact. Appellees' apparent view (ALA Br. 47 n.64) that a court has authority to ignore an unambiguous severability clause is mistaken. *INS* v. *Chadha*, 462 U.S. 919, 932 (1983). While the text of a severability clause is not controlling when the balance of the statute is incapable of functioning independently, *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987), that is not the situation here.